Endless Realty Sdn Bhd v Jaikishan s/o Rewachand

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7–24–2459 OF 1999
NIK HASHIM J
31 JANUARY 2001

Civil Procedure *— Trial — Preliminary issue to be tried — Action on delivery of vacant possession — Plaintiff and defendant agreed and secured a certificate giving the magistrate court power to hear their claims — Plaintiff withdraw action in magistrate court and file afresh in High Court — Whether High Court has jurisdiction to adjudicate plaintiff's claim — Whether parties bound by the certificate — Whether plaintiff estopped from resiling from the terms of the certificate*

The plaintiff had previously filed an action in the magistrate's court claiming for orders, inter alia, for the defendant to deliver up vacant possession. The plaintiff and the defendant had agreed and secured a certificate ('the certificate') under s 65(3) of the Subordinate Courts Act 1948 ('the Act') giving the magistrate's court power to hear the plaintiff's claim as well as the defendant's counter claim even though the claims of both the parties exceed RM25,000. The plaintiff subsequently withdrew the action in the magistrate's court with liberty to file afresh. The plaintiff then filed an originating summons in the High Court over the same cause of action. The defendant made an application pursuant to O 33 of the Rules of the High Court 1980 for the court to determine a preliminary issue of law whether the court has the jurisdiction to adjudicate the plaintiff's originating summons.

Held, striking out the plaintiff's originating summons:

(1) The parties were bound by the certificate. By the certificate, the plaintiff had in fact represented that he was agreeable to be bound by the certificate. Moreover, the defendant's counter-claim, which was a separate and independent action of the plaintiff's action, had not been withdrawn. Therefore, pursuant to s 65(4) of the Act, the plaintiff and the defendant being parties to the certificate were subject to the jurisdiction of the magistrate's court and they were bound by the agreement in the certificate (see p 582D–F).

(2) The order striking out the action with liberty to file afresh in the light of the certificate would only give rise to just one and only meaning that the fresh action could be filed again only in the magistrate's court. Whilst it is true that the action was no more in existence as it was earlier struck out, the plaintiff's was nevertheless bound by the certificate and as such could not file the action in any court it pleased. The plaintiff's originating summons was obviously an abuse of the process of the court (see p 582E–F).

(3) By the statutory certificate, the plaintiff was estopped from resiling from the terms of the agreement. The doctrine of estoppel

operates to bind parties to the meaning or legal effect of a document which they have settled upon (see p 583B).

[Bahasa Malaysia summary

Plaintif, sebelum ini, telah memfailkan satu tindakan undang-undang di dalam mahkamah majistret membuat tuntutan perintah agar defendan memberikan milikan kosong. Plaintif dan defendan telah membuat perjanjian dan mendapatkan satu sijil ('sijil tersebut') di bawah s 65(3) Akta Mahkamah Rendah 1948 ('Akta tersebut') yang memberikan mahkamah majistret kuasa membicarakan tuntutan plaintif dan tuntutan balas defendan walaupun tuntutan kedua-dua pihak melebihi RM25,000. Plaintif kemudiannya menarik balik tindakannya di mahkamah majistret dengan kebebasan memfail semula. Plaintif selepas itu memfailkan satu saman pemula di Mahkamah Tinggi atas alasan tindakan yang sama. Defendan membuat satu permohonan menurut A 33 Kaedah-kaedah Mahkamah Tinggi 1980 supaya mahkamah dapat menentukan satu isu undang-undang awalan sama ada mahkamah mempunyai bidangkuasa untuk mengadili saman pemula plaintif.

Diputuskan, membatalkan saman pemula plaintif:

(1) Pihak-pihak telah diikat oleh sijil tersebut. Melalui sijil tersebut, plaintif telah membuat representasi bahawa beliau bersetuju diikat oleh sijil tersebut. Selain itu, tuntutan balas defendan, yang merupakan tindakan yang berasingan dan bebas dari tindakan plaintif, tidak ditarik balik. Oleh itu, menurut s 65(4) Akta tersebut, plaintif dan defendan, kerana merupakan pihak kepada sijil tersebut, jatuh di bawah bidangkuasa mahkamah majistret dan diikat oleh perjanjian di dalam sijil tersebut (lihat ms 582D–F).

(2) Perintah membatalkan tindakan tersebut dengan kebebasan memfail semula memandangkan keadaan sijil tersebut akan memberi satu dan cuma satu maksud iaitu bahawa tindakan baru itu boleh difailkan semula hanya di mahkamah majistret. Walaupun ia benar bahawa tindakan tersebut tidak lagi wujud kerana ia dibatalkan sebelum ini, plaintif tetap diikat oleh sijil tersebut dan kerana ini tidak boleh memfailkan tindakan di mana-mana mahkamah yang diingini. Saman pemula plaintif memang jelas merupakan salahguna proses mahkamah (lihat ms 582E–F).

(3) Melalui sijil statutori tersebut, plaintif diestop dari memungkiri terma-terma perjanjian. Doktrin estoppel berfungsi untuk mengikat pihak-pihak kepada makna atau kesan di sisi undang-undang satu dokumen yang telah dipersetujui oleh mereka (lihat ms 583B).

Notes

For cases on preliminary issue to be tried, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4929–4932.

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Daewoo Corp v Bauer (M) Sdn Bhd (No 2) [1999] 3 MLJ 417 (refd)

Kapt (B) Mohamad Ismail v Perwira Affin Bank Bhd [1999] 4 CLJ 199 (refd)

Legislation referred to

Rules of the High Court 1980 O 33

Subordinate Courts Act 1948 ss 65(3), (4), 93(1)

YT Ling (*MS Wong* with him) (*Lee, Ling & Partners*) for the plaintiff.

Sri Dev Nair (*Anad & Noraini*) for the defendant.

Nik Hashim J:

Application

This is an application pursuant to O 33 of the Rules of the High Court 1980 ('RHC') by the defendant vide encl 12 for this court to determine a preliminary issue of law:

Whether this court has the jurisdiction to adjudicate the plaintiff's originating summons in encl 1 considering that:

(a) the plaintiff had previously filed an action premised on a similar cause of action in the magistrate's court vide Summons No 72–672–95 claiming for orders for the defendant to deliver up vacant possession of the premises in question, double rentals, interest and the alternative prayer that the defendant is responsible to pay all arrears of rentals from the 1 December 1994 until the date of delivery of vacant possession, and

(b) the plaintiff and the defendant had agreed and secured a certificate under s 65(3) of the Subordinate Courts Act 1948 ('the Act') which gives the magistrate's court power to hear the plaintiff's claim as well as the defendant's counterclaim even though the claims of both the parties exceed RM25,000.

Before answering the question it is pertinent to note that on 20 October 1999 the plaintiff withdrew the action in the magistrate's court and thereafter on 10 December 1999 it filed the originating summons in encl 1 in the High Court over the same cause of action. The striking out order of the magistrate's court reads as follows:

DALAM MAHKAMAH MAJISTRET DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN, MALAYSIA
SAMAN NO 72–672–95

Antara

Endless Realty Sdn Bhd … Plaintif

Dan

Jaikishan s/o Rewachand … Defendan

DI HADAPAN PUAN ROSZIANAYATI BT AHMAD
MAJISTRET, MAHKAMAH MAJISTRET, KUALA LUMPUR
PADA 20 HARIBULAN OKTOBER, 1999. DALAM MAHKAMAH TERBUKA

PERINTAH

ATAS PERMOHONAN plaintif dan SETELAH MEMBACA Notis Menarik Balik yang bertarikh 8 Julai 1999 DAN SETELAH MENDENGAR Cik MS Wong yang menyebut bagi pihak peguamcara Plaintif dan Cik Sumita, Peguamcara bagi pihak Defendan, MAKA ADALAH PADA HARI INI DIPERINTAHKAN BAHAWA tindakan ini dibatalkan dengan kebebasan untuk memfailkan semula dan kos kepada Defendan.

Bertarikh pada 20 haribulan Oktober 1999.

Sd
Pendaftar
Mahkamah Rendah
Kuala Lumpur

Whereas the certificate signed by both the plaintiff and the defendant giving the magistrate's court power to hear the plaintiff's action and the defendant's counterclaim is as follows:

In the magistrate's court at Kuala Lumpur
In the State of Wilayah Persekutuan, Malaysia
(Summons No 72–672–95)

Endless Realty Sdn Bhd … Plaintiff
Jaikishan s/o Rewachand … Defendant

Certificate Pursuant To Section 65(3) of the Subordinate Courts Act 1948 (Act 92)

We the undersigned, hereby agree that the magistrate's court of Kuala Lumpur shall have jurisdiction to try the plaintiff's action or suit and for the defendant's counterclaim herein mentioned pursuant to s 65(3) of the Subordinate Courts Act 1948 (Act 92) and to make such order or judgment or award deemed fit.

Dated this 3rd day of May 1996.

(Sd)
Solicitors for the Plaintiff

(Sd)
Solicitors for the Defendant

Contentions of the parties

Learned counsel for the defendant, En Sri Dev Nair, contended that even though the plaintiff had withdrawn the action in the magistrate's court, the

defendant's counterclaim is still pending before the magistrate's court and because the parties had through the certificate submitted to the jurisdiction of the magistrate's court, the plaintiff could only file the action afresh in the magistrate's court and was therefore estopped from resiling from the terms of the certificate.

En YT Ling, learned counsel for the plaintiff, on the other hand submitted, amongst other things, that this court has the jurisdiction to try the plaintiff's originating summons in encl 1 on the ground that the magistrate's court order dated 20 October 1999 was not limited to be filed only in the magistrate's court. He argued that since the action was struck out, it was no more in existence and the plaintiff was thus free to file its claim in which court it chose.

Findings of the court

With respect, I do not agree with En YT Ling. In this case, there is much merit in En Sri Dev Nair's submissions.

The certificate binds the parties. This certificate is a statutory agreement made by the plaintiff and the defendant under s 65(3) of the Act read together with s 93(1) of the Act. It states very clearly that the plaintiff and the defendant have entered into an agreement in writing that the magistrate's court of Kuala Lumpur shall have jurisdiction to try the plaintiff's action and the defendant's counterclaim in respect of Summons Case No 72–672–95. By the certificate, which was filed in the magistrate's court, the plaintiff had in fact represented that he was agreeable to be bound by the certificate. Moreover, the defendant's counterclaim, which is a separate and independent action of the plaintiff's action, has not been withdrawn. Therefore, pursuant to s 65(4) of the Act, the plaintiff and the defendant being the parties to the certificate shall be subject to the jurisdiction of the magistrate's court, and they are accordingly bound by the agreement in the certificate.

Thus, in the present case, the order of striking out the action 'dengan kebebasan untuk memfailkan semula' (with liberty to file afresh) in the light of the certificate would only give rise to just one and only meaning that the fresh action could be filed again only in the Magistrate's Court, Kuala Lumpur, as the magistrate has the power to make such an order only in that form. It does not make sense to interpret the striking out order to mean otherwise. Whilst it is true that the action was no more in existence as it was earlier struck out, the plaintiff was nevertheless bound by the certificate, and as such, by the clear terms of the certificate, the plaintiff could not file the action in any court it pleased. It could only file the action in the court which was agreed upon in the certificate, ie the Magistrate's Court, Kuala Lumpur.

Doctrine of estoppel

In my judgment, it would be totally unjust to allow the plaintiff to insist on the interpretation of the striking out order 'with liberty to file afresh' to

mean 'with liberty to file afresh not limited to be filed only in the magistrate's court' as suggested by the learned counsel for the plaintiff when it would be inequitable to do so, having regard to the agreement in the certificate limiting the plaintiff's action and the defendant's counter-claim in the magistrate's court. Hitherto, the parties have not withdrawn or set aside the certificate that they had duly signed. In the result, by this statutory certificate, the plaintiff is estopped from resiling from the terms of the agreement. The doctrine of estoppel operates to bind parties as to the meaning or legal effect of a document which they have settled upon (see *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565, which was followed by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

In the case of *Kapt (B) Mohamad Ismail v Perwira Affin Bank Bhd* [1999] 4 CLJ 199, the defendant bank had promised the plaintiff individual that they would revoke the bankruptcy adjudicating and receiving orders in consideration the plaintiff paying a sum of RM60,000 in full and final settlement. However, an advertisement appeared in the newspapers advertising the plaintiff's bankruptcy action. The issue that the court had to decide was whether the defendant had an obligation to revoke the said bankruptcy orders. It was held in that case that the defendant, by the doctrine of estoppel, was estopped from resiling from its promise and that there was no evidence that the defendant had at any time withdrew this promise.

Similarly, the said doctrine equally applies in the present case.

Abuse of the court's process

Further, it is contrary to public policy and abuse of this court's process for this action to be prosecuted in the High Court in respect of expecting an award exceeding RM250,000 when from the outset in the magistrate's court, both the parties had agreed to be bound by the award according to the magistrate's court's jurisdiction irrespective of the telling fact that the amount, at the time of the certificate was secured, had already exceeded the jurisdictional amount in the magistrate's court of RM25,000. Furthermore, the case has been pending since 1995. To allow this case to proceed in the High Court would undoubtedly prejudice the defendant who is an individual who will have to defend a larger claim. Indeed, it is the inherent jurisdiction of this court to deal with an abuse. Once an abuse of process is established, the court is empowered to dismiss the action (see *Daewoo Corp v Bauer (M) Sdn Bhd (No 2)* [1999] 3 MLJ 417).

Conclusion

Since the parties had clearly, through the certificate, submitted to the jurisdiction of the Magistrate's Court, Kuala Lumpur, I hold that this court has no jurisdiction to adjudicate the plaintiff's action. Accordingly, the plaintiff is advised to comply with the certificate it had signed. The

plaintiff's originating summons in encl 1 is obviously a flagrant abuse of the process of the court and as such, I, by virtue of O 33 r 5 of the RHC, order that encl 1 be struck out with costs to the defendant.

Plaintiff's originating summons struck out.

Reported by Jafisah Jaafar